Nos. 88-515 and 88-525

Supreme Court, U.S.
FILED
MAR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,
Appellees.

FEDERAL COMMUNICATIONS COMMISSION AND
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,
Cross-Appellants,

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Cross-Appellee.

On Appeals from the United States District Court for the Central District of California

---

BRIEF AMICUS CURIAE OF HOME BOX OFFICE, INC. IN SUPPORT OF APPELLANT/CROSS-APPELLEE

DANIEL M. WAGGONER *
STUART R. DUNWOODY
CARYN L. ZIMMERMAN
DAVIS WRIGHT & JONES
1752 N Street, N.W.,
Suite 800
Washington, D.C. 20036
(202) 822-9775
and
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101
(206) 622-3150
Counsel for Amicus Curiae

* Counsel of Record

Of Counsel:
JOHN S. REDPATH
HAROLD E. AKSELRAD
SHARI L. PATRICK
HOME BOX OFFICE, INC.
1100 Avenue of the Americas
New York, New York 10036

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. INDECENT SPEECH HAS FIRST AMENDMENT VALUE AND IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION	5
II. AS A REGULATION OF PROTECTED SPEECH, SECTION 223(b) IS SUBJECT TO STRICT SCRUTINY	8
A. This Court Has Not Sanctioned Diminished Protection for Indecent Speech	8
B. Section 223(b) Does Not Withstand Strict Scrutiny	10
1. A Total Ban Cannot Be Justified by the Possibility That Measures to Shield Children Are Not Perfect in All Respects	11
2. Total Bans on Speech Infringe the Right of Parents to Select Speech Heard by their Children	12
C. Availability of Indecent Speech Elsewhere Does Not Justify a Complete Ban on Any Medium	13
III. THE TERM "INDECENT" IS TOO VAGUE FOR THE IMPOSITION OF CRIMINAL SANCTIONS ON SPEECH	14
A. *Pacifica* Does Not Support the Government's Proposed Definition of Indecent Speech	15
B. The Government's Proposed Definition of "Indecent" Is Unconstitutionally Vague	15

TABLE OF CONTENTS—Continued

Page

IV. EVEN IF THIS COURT FINDS THAT THE RESTRICTIONS OF SECTION 223(b) ARE APPROPRIATE FOR TELEPHONE COMMUNICATION, SIMILAR RESTRICTIONS WOULD NOT BE JUSTIFIED ELSEWHERE.. 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES: Page

Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. 1988) 13
Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1968) 9
Black v. Cutter Laboratories, 351 U.S. 292 (1956) 15
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 9, 13
Butler v. Michigan, 352 U.S. 380 (1957) 11
Carey v. Population Services International, 431 U.S. 678 (1977) 9
Carlin Communications, Inc. v. FCC (Carlin I), 749 F.2d 113 (2d Cir. 1984) 10, 19
Carlin Communications, Inc. v. FCC (Carlin II), 787 F.2d 846 (2d Cir. 1986) 10
Carlin Communications, Inc. v. FCC (Carlin III), 837 F.2d 546 (2d Cir. 1988) 19
City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) 17
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 9
Coates v. Cincinnati, 402 U.S. 611 (1971) 17
Cohen v. California, 403 U.S. 15 (1971) 7, 8, 14
Community Television v. Roy City, 555 F. Supp. 1164 (D. Utah 1982) 3
Community Television v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987) 3, 18, 19
Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980) 10, 13, 14
Cruz v. Ferre, 571 F. Supp. 125 (S.D. Fla. 1983), *aff'd*, 755 F.2d 1415 (11th Cir. 1985) 3, 19
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 13
FCC v. Pacifica Foundation, 438 U.S. 726 (1978) ..*passim*
Ginsberg v. New York, 390 U.S. 629 (1968) 13
Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982) 3

TABLE OF AUTHORITIES—Continued

	Page
Hustler Magazine, Inc. v. Falwell, 108 S. Ct. 876 (1988)	6, 7
Kaplan v. California, 413 U.S. 115 (1973)	11
Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969)	7
Kovacs v. Cooper, 336 U.S. 77 (1949)	18
Meyer v. Nebraska, 262 U.S. 390 (1923)	13
Miller v. California, 413 U.S. 15 (1973)	6, 16
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	6
Papish v. Board of Curators, 410 U.S. 667 (1973)	7
Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)	11
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	13
Polygram Records, Inc. v. Superior Court, 170 Cal. App. 3d 543, 216 Cal. Rptr. 252 (1985)	7
Roth v. United States, 354 U.S. 476 (1957)	5
San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 107 S. Ct. 2971 (1987)	14
Schneider v. State, 308 U.S. 147 (1939)	14
Smith v. Goguen, 415 U.S. 566 (1974)	17
Smith v. United States, 431 U.S. 291 (1977)	10, 17
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)	8, 9

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend I	*passim*

OTHER AUTHORITIES:

47 U.S.C. § 223(b)	*passim*
47 U.S.C. § 544(d)(2)(A)	2, 19
Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, First Report and Order, 49 Fed. Reg. 24,996 (1984)	12
Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Second Report and Order, 50 Fed. Reg. 42,699 (1985)	12

TABLE OF AUTHORITIES—Continued

Page

Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Third Report and Order, 2 FCC Rcd. 2714 (1987) 12
New York Times, Sept. 13, 1981 § 6 3
U.S. News & World Report, Nov. 19, 1984 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 88-515 and 88-525

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,
Appellees.

FEDERAL COMMUNICATIONS COMMISSION AND
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,
Cross-Appellants,

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Cross-Appellee.

On Appeals from the United States District Court for the Central District of California

---

BRIEF AMICUS CURIAE OF HOME BOX OFFICE, INC. IN SUPPORT OF APPELLANT/CROSS-APPELLEE

INTEREST OF AMICUS CURIAE

Home Box Office, Inc. ("HBO") provides pay programming to cable television and other viewers throughout the United States. Although Section 223(b)[1] does

---

[1] Section 223(b) of the Communications Act of 1934, as amended, is to be codified at 47 U.S.C. § 223(b). HBO limits its arguments in this brief to those supporting appellant's challenge to the statute's prohibition of indecent speech. HBO does not join in appellant's

not apply to pay television programming, HBO has a great interest in this and all other attempts to regulate speech. HBO itself has been the target of attempts to regulate indecent speech on other occasions.

HBO offers two pay services, HBO and Cinemax, that are designed to complement one another and to provide a full range of programming, including movies, special events, and sports, to viewers of all ages. HBO provides these two services throughout the nation by means of a scrambled signal transmitted via satellite. The scrambled signals are received both by local cable television systems, which retransmit them to their subscribers, and by individual viewers owning "earth stations" (dish antennae) that permit them to receive the satellite signals directly.[2] Persons wishing to view HBO or Cinemax not only must choose to purchase cable television or a dish antenna; they must also choose and pay for the HBO or Cinemax service before the signal will be descrambled and made viewable.[3]

The HBO and Cinemax services include programming tailored for adult audiences. This programming gen-

---

challenge to the portion of the statute dealing with obscenity, as HBO does not transmit and has no interest in transmitting obscene programming. Indeed, it deserves emphasis that the speech cited as objectionable by the government, Government Br. at 6, perhaps could be addressed as obscene.

Written consent of the parties has been filed with the Clerk, as required by Rule 36.

[2] In some communities viewers also may receive the HBO and Cinemax services through microwave distribution systems.

[3] Cable subscribers and dish owners can obtain further control over viewing of cable service in their households through lock boxes that cable operators are required to make available to customers. 47 U.S.C. § 544(d)(2)(A). These lock boxes permit a cable subscriber or dish owner to prevent viewing of a particular cable service during periods selected by the viewer, enabling parents to control their children's access to programming.

erally airs later in the evening. Viewers are given notice of the content of the programming through printed program guides supplied to all subscribers of the services and through notices that precede the programming on the air. Examples of this programming include shows such as "Not Necessarily the News" and "On Location," comedies that often include satires of the occasionally indecent behavior of public officials and figures, frequently in a ribald manner, and movies such as "Wall Street" or "Frenzy," which use adult language and nudity as essential elements of an overall portrayal of society.

Several states and municipalities have enacted statutes and ordinances outlawing the transmission of "indecent" programming on cable television. HBO has joined in challenges to these restrictions, which uniformly have been invalidated as overbroad and as unduly restrictive means of serving the governmental interest. *See, e.g., Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982); *Community Television v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Community Television v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987); *Cruz v. Ferre*, 571 F. Supp. 125 (S.D. Fla. 1983), *aff'd*, 755 F.2d 1415 (11th Cir. 1985). Regulation of indecent speech has also been rejected by viewers and voters in jurisdictions ranging from the State of Utah, and the town of Vista, California, where voters rejected local initiatives to ban "indecent" cable programming, to the community of Mesquite, Texas, where a proposal to ban all R-rated material from the community's prospective cable system was rejected by referendum. *New York Times*, September 13, 1981, § 6, at 44, col. 1; *U.S. News & World Report*, Nov. 19, 1984, at 96.

HBO submits this brief to stress that prohibitions of indecent speech such as that imposed by Section 223(b) violate the First Amendment.[4]

SUMMARY OF ARGUMENT

Section 223(b) unconstitutionally bans speech that is fully protected by the First Amendment. Indecent speech plays an important role in artistic, literary, and political expression. Under the rationale for § 223(b), serious works of art or literature considered "patently offensive" by the public would be stripped of their First Amendment protection although this Court has repeatedly affirmed that such speech has First Amendment value.

Section 223(b) cannot survive the strict scrutiny applied to any restriction on fully protected speech. The statute's complete ban of indecent speech is not narrowly drawn to serve its purported goal of shielding children from such speech. This Court should reject the government's argument that only a total ban serves the government's interest in enhancing parental control over children's access to indecent speech. The government's definition of "indecent" also is too vague a standard to support imposition of criminal sanctions on expression.

If the Court upholds Section 223(b) despite its infirmities under the First Amendment, the Court should carefully limit its ruling to the medium of expression at issue here, telephone communication as employed by appellant/cross-appellee.[5]

---

[4] HBO also submits this brief to point out the distinctive characteristics of its pay programming that distinguish it from other media.

[5] The medium employed by HBO, scrambled pay television, ensures that children may be shielded from indecent speech while still allowing access by adults. This creates a different First Amendment calculus that would render even more clearly unconstitutional a ban of indecent speech on pay television.

ARGUMENT

I. INDECENT SPEECH HAS FIRST AMENDMENT VALUE AND IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

By the terms of the government's proposed definition, indecent speech is not limited to that lacking serious literary, artistic, political or scientific value, but includes any speech that is patently offensive, whether it has such value or not. Government Br. at 18. *See also infra* at 6. Indecent speech under the government's definition does have such value, and is entitled to the full protection of the First Amendment.[6] *See infra* at 15.

Speech with serious artistic or literary merit often is considered indecent under some standard. Artists and writers often challenge existing mores, with the result that their work may be seen by the public at large as "patently offensive as measured by contemporary community standards." Works dealing with sex are especially likely to be considered patently offensive. Sexual content alone, however, does not strip a work of First Amendment protection. On the contrary,

> [t]he portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the valid problems of human interest and public concern.

Roth v. United States, 354 U.S. 476, 487 (1957) (footnote omitted). Indeed, the absence of a requirement that indecent speech appeal to the prurient interest threatens

---

[6] The social value of indecent speech has also been affirmed by the electorate, which has rejected initiatives seeking to regulate indecent or R-rated cable programming. *See supra* at 3.

to sweep within its ambit many works in which sex is not the dominant theme, but only an incidental subject.[7]

History shows that many novels that would not have been deemed obscene at the time of their publication under the test set forth in *Miller v. California*, 413 U.S. 15 (1973), still would have qualified as indecent under the government's definition here. For example, the serious literary value of *Ulysses* and *Lady Chatterly's Lover* presumably would have prevented their being classified as obscene under the *Miller* test, but, because these books were ahead of the mores prevailing at the time, they likely would have been considered "patently offensive" and therefore indecent.

Indecent speech is often a component of political speech and social commentary. Political parody frequently seeks to puncture overblown egos by showing that politicians are subject to the same sexual drives and other bodily demands as ordinary mortals. The sexual peccadilloes of politicians and public figures have long been considered fair subjects for political comment. Indeed, comedic programming such as HBO's "Not Necessarily the News", may address these subjects through satire simply because the medium of humor is more effective and pointed. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (protection for "vehement, caustic and sometimes unpleasantly sharp attacks").

Political parody and commentary may be patently offensive simply because they address these themes. For example, the parody at issue in *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876 (1988), could be indecent under

---

[7] *Pacifica* suggests that patently offensive elements must pervade a work before it can be characterized as indecent. The majority expressly reserved decision on whether "an occasional expletive" would justify regulation, 438 U.S. at 750, and Justices Powell and Blackmun, concurring, repeatedly emphasized that the broadcast at issue constituted a "verbal shock treatment" in which offensive elements were pervasive. *Id.* at 757 and 761.

the government's proposed definition because it described sexual and excretory activities in "an ad parody offensive to [Falwell] and doubtless gross and repugnant in the eyes of most." *Id.* at 879. *See Hustler Magazine, Inc. v. Falwell*, No. 86-1278, Pet. for Cert. at E-1 (Feb. 2, 1987) (reproducing parody). *See also Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543, 216 Cal. Rptr. 252 (1985) (action against HBO and others for a comedy routine in which Robin Williams commented on social issues in terms some listeners would consider highly offensive); *Papish v. Board of Curators*, 410 U.S. 667 (1973) ("indecent" cartoon protected by First Amendment); *Cohen v. California*, 403 U.S. 15 (1971) (the words "fuck the draft").

Indecent speech can also be a necessary part of academic discourse. In *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969), a magazine article that the Court found "scholarly, thoughtful and thought-provoking" used a word delicately described as a "highly offensive . . . , vulgar term for an incestuous son." 418 F.2d at 361. The court found the use of the word was "important to the development of the thesis and the conclusions of the author," and held that the plaintiff teacher's use of the word was protected by the First Amendment because "no proper study of the article could avoid consideration of this word." *Id.*

Finally, indecent speech is entitled to First Amendment protection because it may be the only way for a speaker to convey the precise message he wishes to deliver. As the Court recognized in *Cohen v. California*,

> much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content

> of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

403 U.S. at 26.

II. AS A REGULATION OF PROTECTED SPEECH, SECTION 223(b) IS SUBJECT TO STRICT SCRUTINY.

A. This Court Has Not Sanctioned Diminished Protection for Indecent Speech.

This Court has never held that restrictions on indecent speech or nonobscene speech with sexual content are subject to more lenient review than restrictions on other categories of protected speech. Of the Court's members reaching the constitutional issue in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), a plurality explicitly rejected the notion that restrictions on indecent speech are subject to less exacting scrutiny. Justice Powell, joined by Justice Blackmun, stated in his concurrence that:

> I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection, and which is less "valuable" and hence deserving of less protection.

438 U.S. at 761. Justice Brennan, joined by Justice Marshall, dissenting in *Pacifica*, rejected "the notion . . . that the degree of protection the First Amendment affords protected speech varies with the social value ascribed to that speech by five Members of this Court." *Id.* at 762-63. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), a majority of the Court expressed the view that all protected speech is entitled to the same degree of First Amendment protection. *See* 427 U.S. at 73 n.1 (Powell, J., concurring in result); *id.* at 85-86 (Stewart,

J., dissenting, joined by Justices Brennan, Marshall and Blackmun).[8] The distinctive attributes of broadcasting mean that *Pacifica* "does not readily translate into a justification for regulation of other means of communication." *Bolger*, 463 U.S. at 74.[9]

Similarly, *Young v. American Mini Theatres* is not authority for applying a test less exacting than strict scrutiny here. To the extent the decision is applicable, it demonstrates that § 223(b) is not a permissible time, place and manner restriction but rather a *total* ban. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (geographic restriction that provided alternative locales for speech). *See also American Mini Theatres*, 427 U.S. at 70 (plurality opinion) and at 82 n.6 (Powell, J., concurring) and *City of Renton*, 475 U.S. at 49-50 (regulations aimed at "secondary effects" of physical deterioration, not content of speech).[10]

Applying decreased scrutiny to restrictions on indecent speech is not only inconsistent with this Court's precedents, but would be difficult to administer and confine. The government fails to articulate the terms of the less

---

[8] Nor does the distinguishing characteristic of indecent speech—its offensiveness—provide a basis for affording it lesser First Amendment protection. Rather, "offensiveness [is] 'classically not [a] justificatio[n] validating the suppression of expression protected by the First Amendment.'" *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983), quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977).

[9] HBO would contend that *Pacifica* was wrongly decided to the extent that it applied a definition of "indecency" that did not take into account the other merits of such speech and imposed content-based limitations on broadcasting. In any event, *Pacifica* does not support Section 223(b) because the statute bans indecent speech *in toto*, rather than channeling or otherwise limiting access to it.

[10] *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), also does not offer support for more lenient review of indecent speech or speech with sexual content, as it involved a captive audience of students at a high school assembly.

exacting standard it claims would apply to indecent speech. Instead, it simply proposes an *ad hoc* justification for the result it seeks in this case. The government also fails to explain what principle would limit this less exacting standard of review to restrictions on indecent speech or prevent its application to restrictions on other types of speech that the legislature finds undesirable.

B. Section 223(b) Does Not Withstand Strict Scrutiny.

Section 223(b) must be subjected to the strict scrutiny imposed upon restrictions of protected speech.[11] Under this test,

> the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling interest.

Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 540 (1980).

There is no doubt that the interest identified by the government—allowing parents to safeguard the well-being of children—is compelling. But Section 223(b) is not a precisely drawn means of serving that interest and therefore must be invalidated. The government's argument to the contrary would, if accepted, nullify the requirement that restrictions on speech be precisely drawn. *Cf. Carlin Communications v. FCC*, 787 F.2d 846, 855 (2d Cir. 1986); 749 F.2d 113, 121 (2d Cir. 1984) ("The Government bears the heavy burden of demonstrating that the compelling state interest could not be served

---

[11] Although the government makes much of the large Congressional vote in favor of Section 223(b), this does not affect this Court's duty to review the statute and overturn it if necessary. The substantial margin in favor of the statute may merely reflect "that it is much more popular to be against sin than to be tolerant of it." *Smith v. United States*, 431 U.S. 291, 315 n.13 (1977) (Stevens, J., dissenting). In any event, it is precisely where restrictions on speech have majority support that this Court's duty of review is most important.

by restrictions that are less intrusive on protected forms of expression").

1. *A Total Ban Cannot be Justified by the Possibility That Measures to Shield Children Are Not Perfect in All Respects.*

From the FCC's determinations that "[n]o method guarantees that some enterprising minors will never hear the messages" and that "absolute impossibility of access to [dial-a-porn] services . . . is not feasible," the government concludes that the outright ban of Section 223 (b) is the narrowest available alternative to prevent children's access to indecent speech conveyed by telephone. This reasoning would justify complete bans of every type of expression thought to be harmful to children, for few if any regulations of speech short of a total ban can ensure that no speech will escape control.

Following the government's logic, a complete ban on sexually explicit but nonobscene books would be a regulation narrowly tailored to serve the compelling state interest of preventing access by children to such books. As this Court has observed,

> [f]or good or ill, a book has a continuing life. It is passed hand to hand, and we can take note of the tendency of widely-circulated books of this category [*i.e.*, sexually explicit] to reach the impressionable young and have a continuing impact.

Kaplan v. California, 413 U.S. 115, 120 (1973) (footnote omitted). *Accord*, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 n.7 (1973). As a result, nothing short of a total ban could seal off children from such books. Under the government's theory, therefore, *Butler v. Michigan*, 352 U.S. 380 (1957), was wrongly decided because it overturned just such a complete ban of books on the ground that adults cannot be "reduce[d] to reading only what is fit for children," *Id.* at 383-84.

A complete ban on sexually explicit but nonobscene video tapes similarly would satisfy the government's test. Video cassette players are widespread and may be operated by an unsupervised child. Even if parents own no such tapes, or keep what tapes they do own under lock and key, there is no guarantee that their child will not see them at the home of a friend with less careful parents or by some other means outside the home. *Cf.* Government Br. at 33 n.22.

The undeniable truth that few, if any, measures short of a total ban can shield all children from all indecent speech at all times should not permit Congress to reject such measures and adopt instead the drastic alternative of a total ban on indecent speech. In this case, the FCC has identified numerous less restrictive alternatives to a complete ban that would serve the government's interest in protecting children.[12] *See* Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Third Report and Order, 2 FCC Rcd. 2714 (1987); Second Report and Order, 50 Fed. Reg. 42,699 (1985); First Report and Order, 49 Fed. Reg. 24,996 (1984). That these alternatives are not perfect in all respects should not be allowed to transmogrify the most drastic regulation—the total ban of Section 223(b)—into a narrowly tailored restriction.

2. *Total Bans on Speech Infringe the Right of Parents to Select Speech Heard by their Children.*

Section 223(b) also is not precisely drawn because it deprives parents of the chance to choose the speech to be heard by their children. The interest of parents in directing the upbringing of their children is entitled to

---

[12] Even more effective alternatives are available to insure that indecent speech on pay television does not reach unsupervised children but remains available for adults. *See* Note 3 *supra* and text at 18-19, *infra*.

considerable weight. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). To the extent speech is regulated, therefore, it should be with the aim of giving parents tools to control children's access to speech, not to cut off access altogether.

In *Ginsberg v. New York*, 390 U.S. 629 (1968), for example, the Court upheld a ban on selling materials to minors, while specifically noting that the statute "does not bar parents who so desire from purchasing the magazines for their children." *Id.* at 639 (footnote omitted). Similarly, in *Action for Children's Television v. FCC*, 852 F.2d 1332, 1343 (D.C. Cir. 1988), the Court of Appeals properly emphasized that "the government does not propose to act *in loco parentis to* deny children's access *contrary to* parents' wishes." (Emphasis in original, footnote omitted.) *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (improper to suppress speech "solely to protect the young from ideas or images that a legislative body thinks unsuitable for them"). The total ban of Section 223(b) thus contradicts rather than supports the governmental interest of enhancing parental control over children's access to speech.

C. Availability of Indecent Speech Elsewhere Does Not Justify a Complete Ban on Any Medium.

Section 223(b)'s prohibition of indecent speech conveyed by telephone is not saved by the availability of indecent speech on other media. This Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternate means of expression." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. at 540 n.10. " 'One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' " *Bolger*,

463 U.S. at 69 n.18, quoting *Schneider v. State*, 308 U.S. 147, 163 (1939).[13]

Nor can the prohibition be justified on the ground that a speaker can convey the same message using inoffensive speech. The message a speaker wishes to convey is often inseparable from words, including indecent ones, that he chooses. As a result, "[t]his Court has recognized that words are not fungible, and that the suppression of particular words 'run[s] a substantial risk of suppressing ideas in the process.'" *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 107 S. Ct. 2971, 2978 (1987), quoting *Cohen v. California*, 403 U.S. at 26.

III. THE TERM "INDECENT" IS TOO VAGUE FOR THE IMPOSITION OF CRIMINAL SANCTIONS ON SPEECH.

Where protected speech is at issue, the First Amendment demands that regulations be "precisely drawn." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980). Section 223(b) does not even attempt to define indecent speech. Nor does *Pacifica*, as the government contends, supply meaning to the term "indecent."[14] In any event, the government's proposed definition of "indecent" is unacceptably vague for regulation of protected speech.

---

[13] The government's theory, if adopted, would support a ban on indecent speech in movie theaters because some individuals might be able to view such movies on video cassette players.

[14] The FCC defined indecency as follows:

> "[T]he concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."

Pacifica, 438 U.S. at 732, quoting 56 FCC 2d at 98.

A. *Pacifica* Does Not Support the Government's Proposed Definition of Indecent Speech.

Section 223(b) imposes criminal sanctions on "indecent" speech. Congress may have sought to use the term as defined in *Pacifica*, Government Br. at 18, but that decision offers no precise definition of "indecency." The plurality opinion in *Pacifica* quoted the definition of "indecent" used in the opinion and order of the FCC [15] but was careful not to adopt it. The plurality stressed that the Court "'reviews judgments, not statements in opinions,'" 438 U.S. at 734 (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)), and limited its review to "whether the Commission has the authority to proscribe this particular broadcast." 438 U.S. at 742 (plurality opinion). *See also Id.* at 754-56 (Powell, J., concurring).

The government here proposes to define indecent speech as that which "'"describes, in terms patently offensive as measured by contemporary community standards for the * * * medium, sexual or excretory activities and organs."'" Br. at 18 (quoting *Pacifica*, 438 U.S. at 732 (quoting FCC definition)). The government concedes that, under its proposed definition, indecent speech may have serious literary, artistic, political or scientific value and need not appeal to the prurient interest.

B. The Government's Proposed Definition of "Indecent" Is Unconstitutionally Vague.

The definition of "indecent" that the government proposes is excessively vague for a regulation imposing

---

[15] The government does not even adopt the FCC definition of "indecent" *in toto*, as the definition it proposes omits the time of day component of the FCC definition. Government Br. at 19 n.12. The time of day component was a critical part of *Pacifica*'s review of indecency, and this Court emphasized that "context is all-important," 438 U.S. at 750, and specifically reserved decision as to the constitutionality of an around-the-clock ban on broadcast indecency. *Id.* at 760 n.28.

criminal sanctions on speech. The central characteristic of indecent speech under the government's proposed definition—patent offensiveness as measured by contemporary community standards—fails to offer sufficiently precise guidance to those seeking to avoid the criminal sanctions of Section 223(b). It simply is not clear which descriptions will be deemed "patently offensive" for a given medium under contemporary community standards.

The vagueness created by the "patent offensiveness" standard is especially acute for a national programmer. Communities vary widely throughout the United States. What is patently offensive in a small town in Utah may differ from what is patently offensive in a small town in Nevada; the standards for patent offensiveness in both of these towns may be substantially different from that prevailing in Los Angeles. Determining what is "patently offensive" in the most sensitive community served by a national distributor can be extremely difficult, if not impossible.[16]

Miller v. California, 413 U.S. 15, 24 (1973), also refers to "patent offensiveness" under community standards in its definition of obscenity. But this test is unconstitutional as applied to indecent speech because "patent offensiveness" is the primary defining characteristic of indecency. Obscenity, by contrast, is more precisely defined by the requirements that it appeal to the prurient interest, that it lack serious literary, artistic, political or scientific value, and that obscenity laws "specifically define[]" the patently offensive sexual conduct proscribed

---

[16] A nationwide programmer such as HBO could not tailor its programming to meet the needs of each individual community because it distributes programming via satellites that cover broad regions of the country. A "community standards" test for indecency, if applied to HBO, would effectively reduce programming to the level acceptable to the most sensitive community, thereby denying less sensitive communities access to speech that is acceptable to them.

by the laws. *Id.* Indeed, Justice Stevens, the author of the lead opinion in *Pacifica*, recognized in an earlier case that "patent offensiveness" is too vague a standard upon which to base imposition of criminal sanctions: "The line between communications which 'offend' and those which do not is too blurred to identify criminal conduct." *Smith v. United States*, 431 U.S. 291, 316 (1977) (Stevens, J., dissenting). *See also Pacifica*, 438 U.S. at 739 n.13, and 750 (reserving decision as to whether indecent speech could be the basis of a criminal prosecution) (majority portion of lead opinion). *Accord Coates v. Cincinnati*, 402 U.S. 611 (1971) (statute outlawing "annoying" conduct unconstitutionally vague).

The ambiguity of Section 223(b) is all the more intolerable because it impinges upon freedom of expression where "a greater degree of specificity [is demanded] than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

IV. EVEN IF THIS COURT FINDS THAT THE RESTRICTIONS OF SECTION 223(b) ARE APPROPRIATE FOR TELEPHONE COMMUNICATION, SIMILAR RESTRICTIONS WOULD NOT BE JUSTIFIED ELSEWHERE.

If, despite the arguments set forth above, the Court upholds Section 223(b), it should carefully limit its decision to the medium at issue—interstate commercial telephone communication—and reaffirm its previous holdings that each restriction on expression must be analyzed according to the particular characteristics of the medium to which it applies, on a fully developed factual record. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) (refusing to rule on First Amendment issues concerning cable television in the absence of a fully developed record).

The Court recognized in *Pacifica* that "each medium of expression presents special First Amendment prob-

lems," 438 U.S. at 748, and that regulation of indecency depends on the medium on which it appears. The concept of indecency "requires consideration of a host of variables," including "[t]he time of day . . ., the composition of the audience, and differences between radio, television, and *perhaps closed-circuit transmissions* . . . ." *Id.* at 750 (footnote omitted) (emphasis added). *See also Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) ("The movie picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself . . . .").[17]

The necessity for a separate analysis of each medium is demonstrated well by the courts' rejection of regulation of indecency on pay television programming. For instance, this Court's summary affirmance in *Wilkinson v. Jones*, 480 U.S. 926 (1987), *aff'g Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'g Community Television v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985), tacitly recognized the special characteristics of cable television that make bans of indecent speech on that medium unconstitutional.[18] Those characteristics include the following: (1) the affirmative choice required to acquire basic cable service; (2) the separate choice to add and pay a premium for services such as HBO; (3) the "scrambling" that prevents viewing of premium channels without payment of that separate fee; (4) the availability of "lock boxes" which allow parents or other subscribers to block access to programming, even if the serv-

---

[17] This is not to suggest that regulation of indecency would be constitutional as to other media, but only that each medium must be separately analyzed.

[18] *Wilkinson* involved a constitutional challenge to the Utah Cable Television Programming Decency Act, which authorized state officials to bring nuisance actions against persons distributing indecent material within the state over a cable television system or via pay-per-view television programming.

ice has been paid for and the programming is no longer "scrambled"; and (5) the general availability of guides that provide advance notice of programming. 611 F. Supp. at 1113 (quoting Memorandum for the Federal Communications Commission as amicus curiae at 5-6).[19] *See also Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (*Pacifica* cannot be extended to uphold city ordinance regulating distribution of indecent material through cable television because cable television is not as intrusive or as accessible to children as broadcast television).

These characteristics of pay programming are but examples of the many differences among media that distinguish both the degree to which viewers or listeners exercise choices and the extent to which government should be allowed to intervene in those choices. Each medium, too, may change over time in its technology of distribution and the manner in which viewers or listeners gain access to programming. *Compare Carlin Communications, Inc. v. FCC* (Carlin I), 749 F.2d 113 (2d Cir. 1984) with *Carlin Communications, Inc. v. FCC* (Carlin III), 837 F.2d 546 (2d Cir. 1988), *cert. denied*, No. 88-37 (Oct. 31, 1988) (changes in ability of telephone network to control access to dial-it services). As this Court has recognized, these distinctions preclude broad conclusions and mandate that any affirmance of Section 223(b) should not extend beyond its present application to indecent speech as currently distributed over the existing telephone system.

---

[19] The availability of a lock box may be the most important characteristic distinguishing cable television from telephones. These lock boxes, which cable systems are required by statute to provide to their subscribers upon request, 47 U.S.C. § 544(d)(2)(A), and which are also available to dish owners, permit a subscriber to prohibit viewing of a particular cable service during periods selected by the subscriber. A parent can use the lock box to shut off access to a given channel at all times except when he or she is present, or can review program guides to locate programming from which he wishes to shield his children, and restrict access during those hours.

CONCLUSION

The judgment of the district court holding Section 223(b) unconstitutional should be affirmed.

Respectfully submitted,

DANIEL M. WAGGONER*
STUART R. DUNWOODY
CARYN L. ZIMMERMAN
DAVIS WRIGHT & JONES
1752 N Street, N.W.,
Suite 800
Washington, D.C. 20036
(202) 822-9775
and
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101
(206) 622-3150
Counsel for Amicus Curiae

Of Counsel:
JOHN S. REDPATH
HAROLD E. AKSELRAD
SHARI L. PATRICK
HOME BOX OFFICE, INC.
1100 Avenue of the Americas
New York, New York 10036

March 27, 1989

* Counsel of Record